No. 187

In the Supreme Court of the United States

OCTOBER TERM, 1945

CHERRY COTTON MILLS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 15–18) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945 (R. 20–21). The petition for a writ of certiorari was filed on July 2, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, in a suit brought by petitioner against the United States in the Court of Claims on a tax refund claim, the Government may assert a counterclaim based on petitioner's indebtedness to the Reconstruction Finance Corporation.

STATUTE INVOLVED

Section 145 of the Judicial Code, 28 U. S. C. 250 (2), provides, *inter alia:*

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> * * * * *
>
> Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *

STATEMENT

In 1936, the Reconstruction Finance Corporation ("R. F. C.") participated with an Alabama national bank in a loan of $110,000 to petitioner, an Alabama corporation, the loan being evidenced by petitioner's note and secured by a mortgage on its property (R. 10–12).[1] Petitioner defaulted

[1] Petitioner applied to the bank for the loan in October, 1935, with the understanding that the bank would request the R. F. C. to purchase a participation therein (R. 10). The note for $110,000 with interest, and the mortgage which

in repaying the loan, the mortgage was duly foreclosed on July 12, 1939, and the R. F. C. and the bank were left with a deficiency claim against petitioner amounting to $5,963.51 due to the R. F. C. and $2,981.74 due to the bank (R. 12–13).[2]

In February 1942, the Commissioner of Internal Revenue allowed a claim filed by petitioner for a refund of processing and floor stock taxes paid by it under the Agricultural Adjustment Act, in the amount of $3,104.87, and petitioner was advised that, unless it was indebted to the United States Government, a check for such refund would issue to it (R. 13). On August 11, 1942, the General Accounting Office issued a Certificate of Settlement in connection with the tax refund claim, directing that a check for $3,104.87 in settlement of the claim be issued to the R. F. C. to liquidate partially the indebtedness of petitioner

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secured it, were executed by petitioner to the bank in January 1936 (R. 10). In February, 1936, pursuant to a Participation Agreement between the R. F. C. and the bank, the R. F. C. acquired a ⅔ interest in the note, leaving a ⅓ interest in the bank which transferred the note and mortgage to the R. F. C. "for value received" (R. 11–12). The bank advanced the $110,000 to petitioner in installments ending in August 1936 (R. 12).

[2] On default by petitioner, the R. F. C. instituted foreclosure proceedings in the joint names of itself and the bank on July 12, 1939, when a total of $108,194.06 was due on the note. The R. F. C. and the bank jointly purchased the property at the foreclosure sale for $100,000, leaving a total deficiency (including expenses of sale) of $8,945.25, of which ⅔ or $5,963.51 was due to the R. F. C. (R. 12–13).

to the R. F. C. in the amount of $5,963.51 plus interest from July 12, 1939 (R. 2, 13–14). Apparently in ignorance of this Certificate of Settlement, the Treasurer of the United States issued a check on August 17, 1942, in the amount of the refund, payable to petitioner (R. 13), but on August 26, 1942 that check was stopped and recalled from petitioner by a telegram from the Chief Disbursing Officer of the Treasury, informing petitioner that the check should have been drawn to the R. F. C. to liquidate partially petitioner's indebtedness to the R. F. C. (R. 13–14). After petitioner returned that check to the Treasury Department a reissued check in the same amount was drawn to the order of the R. F. C. and was transmitted to it by the Treasurer of the United States in accordance with the instructions in the Certificate of Settlement (R. 13–14). On September 2, 1942, the R. F. C. allowed petitioner a credit or deduction in the amount of the check, on petitioner's indebtedness to the R. F. C. (R. 14).

On June 12, 1943, petitioner instituted this suit in the Court of Claims to recover the tax refund "without credit or set-off" on account of its indebtedness to the R. F. C. (R. 1–2); and the Government filed an answer and counterclaim for the amount due to the R. F. C. after applying the tax refund check (R. 3–8). After finding the facts as set forth above, the court below dismissed peti-

tioner's suit and rendered judgment in favor of the United States on the counterclaim, in a stipulated amount of $4,165.73 (R. 19, 20–21).[3]

ARGUMENT

Petitioner unsuccessfully contended below, and now urges in its application for certiorari, that it should be permitted to recover judgment against the United States for the tax refund, but that the Government should be denied the right to counterclaim in the same suit for a debt admittedly owed by petitioner to a corporate agency of the Government (Pet. 2, 4–6, 7–8). We submit that the rejection of this contention by the court below was right, in view of Section 145 of the Judicial Code, *supra*, p. 2, vesting jurisdiction in the Court of Claims over "counterclaims * * * on the part of the Government", and that review by this court is not warranted.

Contrary to petitioner's assertion, the issue herein is not "one of first impression" (Pet. 7). This Court has declined to review two prior decisions of the court below dealing with the same question, in each of which the Court of Claims permitted a counterclaim to be asserted by the United States on account of a debt due to a government corporation—the United States Shipping Board Emergency Fleet Corporation. *Crane et al.,*

[3] In its petition to this Court, petitioner incorrectly states that the court below gave judgment in favor of the R. F. C. (Pet. 2, 4, 8).

Receivers v. *United States*, 73 C. Cls. 677, certiorari denied, 287 U. S. 601; *Ship Construction Company, Inc.* v. *United States*, 91 C. Cls. 419, certiorari denied, 312 U. S. 699.[4]

Any other result would be contrary to elementary principles of agency. The R. F. C. is a "federal instrumentality" and an agency of the United States. *Maricopa County* v. *Valley National Bank of Phoenix*, 318 U. S. 357, 362; *Langer* v. *United States*, 76 F. 2d 817, 819, 822–823 (C. C. A. 8).[5] Whether the corporation acts in its own name or as agent for the United States, its agency relationship to the government is as a matter of law deemed to be a part of all its transactions. *Russell Co.* v. *United States*, 261 U. S. 514; *Ship Construction Co.* v. *United States*, 91 C. Cls. 419, certiorari denied, 312 U. S. 699. Hence, the claim of the corporate agent is in law that of the United States (*United States Grain Corporation* v. *Phillips*, 261 U. S. 106; *Inland*

[4] Compare *Defense Supplies Corporation* v. *United States Lines Co.*, 148 F. 2d 311 (C. C. A. 2d), pending on petition for certiorari, No. 222, present Term, in which a government corporation one step further removed from its principal (i. e., a corporate subsidiary of the R. F. C.) was held sufficiently identified with the Government to preclude a suit in the Corporation's name brought against the United States by an insurance company as subrogee.

[5] All of the capital stock of the R. F. C. is owned by the United States and management of the corporation is vested in a Board of Directors appointed by the President and confirmed by the Senate. (R. 10; Act of January 22, 1932, secs. 2 and 3, 47 Stat. 5, 15 U. S. C. 602–603.)

Waterways Corp. v. *Young*, 309 U. S. 517; *Clallam County* v. *United States*, 263 U. S. 341), enforceable by the United States in its own name and right as the "real party in interest." *Erickson* v. *United States*, 264 U. S. 246 (suit by United States to enforce contract rights of United States Spruce Corporation).[6] It follows that, in lieu of suing affirmatively on the claim as plaintiff under Section 24 (1) of the Judicial Code (28 U. S. C. 41 (1)), the United States may enforce it by way of counterclaim under Section 145, as it could a claim originating in a noncorporate department of the Government. *Crane* v. *United States, supra; Ship Construction Co., Inc.* v. *United States, supra.*

The power of the R. F. C. to enforce the claim against petitioner in an independent suit in its own name, the result of its power to "sue and be sued," is no different from the right of a private

[6] See also *United States* v. *Skinner & Eddy Corp.*, 35 F. 2d 889 (C. C. A. 9); *United States* v. *Czarnikow-Rionda Co.*, 40 F. 2d 214 (C. C. A. 2); *North Dakota-Montana Wheat Growers' Assn.* v. *United States*, 66 F. 2d 573 (C. C. A. 8), certiorari denied, 291 U. S. 672; *United States* v. *New Amsterdam Casualty Co.*, 55 F. 2d 377 (S. D. N. Y.). The right of the United States to sue in its own name as the "real party in interest" in connection with R. F. C. transactions has been specifically upheld by several district courts. *United States* v. *Arthur*, 23 F. Supp. 537 (S. D. N. Y.); *United States* v. *Freeman*, 21 F. Supp. 593 (D. Mass.); *Reconstruction Finance Corporation* v. *Graydon*, 16 F. Supp. 765 (E. D. S. C.); *Reconstruction Finance Corporation* v. *Krauss*, 12 F. Supp. 44 (D. N. J.).

agent, in certain circumstances, to assert the principal's claim, but this does not prevent a judgment in favor of the principal from being a valid acquittance to the debtor of any claim on the part of the agent. Restatement of Agency, Sec. 368; Williston, *Contracts* (rev. ed., 1936), Sec. 293; Mechem, *Agency* (1914 ed.), Sec. 2045.[7]

The only alternative to the applicability of Section 145 of the Judicial Code to the instant counterclaim is the maintenance of two separate suits to accomplish precisely what was achieved below in one. Such multiplicity and circuity of action is the very result which the counterclaim provision was designed to avoid. Cf. *Barry* v. *United States*, 229 U. S. 47, 53.[8]

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[7] Decisions dealing with the "sue and be sued" capacity of the R. F. C. are not pertinent here, as the court below rightly observed, since nothing in those decisions or in the statutes creating the R. F. C. indicates that Congress intended, by utilizing the corporate form, to require "that the United States must pay out money to one who is indebted to it, through its agent and trustee, in a greater amount on a debt past due" (R. 17).

[8] Whether the Comptroller General, who first asserted the right of set-off in this case, was authorized by statute to do so, is no concern of petitioner's, as the court below properly observed, since "it was the duty of someone * * * to see that this set-off was made" (R. 17). *Crane* v. *United States*, *supra*; *Ship Construction Co., Inc.* v. *United States*, *supra*; cf. *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1. In any event, the Comptroller General acted within his powers in making the set-off here in question. See Sections 304 and 305 of the Budget and Accounting Act of 1921, 42 Stat. 24; *Barry* v. *United States*, 229 U. S. 47, 53.

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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